

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ARCE/LOGAN, Minors.

UNPUBLISHED

June 19, 2014

No. 318471

Jackson Circuit Court

Family Division

LC No. 12-001239-NA

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Respondent-mother appeals as of right the order terminating her parental rights to the minor children KA and AL under MCL 712A.19b(3)(g) (failure to provide proper care and custody) and (j) (reasonable likelihood of harm if child is returned to parent's home). We affirm.

I. BACKGROUND

The Department of Human Services (DHS) filed an original permanent custody petition in this case against respondent and the father of AL after KA suffered life-threatening injuries to her abdominal area that required multiple surgeries and a 53 day stay in the University of Michigan's Mott Children's Hospital. The case involved investigations by both law enforcement and Children's Protective Services (CPS). Probable cause having been waived for the original petition, filing of the petition was authorized, the children removed and a trial to determine the status of parental rights was scheduled. Amended petitions were filed as allegations grew and were again authorized for filing by waiver of probable cause.

The trial court combined the trial with an evidentiary hearing to address DHS' tender years motion. Testimony from law enforcement, multiple therapists and two doctors was offered in regards to the accusatory statements made by KA about her father having stomped on and kicked her. The statements were ultimately not admitted by the trial court because of the circumstances surrounding the statements and for their lack of adequate indicia of truthfulness where the statements did not come about and were not in such detail until after KA was placed with her grandmother. The trial involved testimony from therapists, DHS and CPS caseworkers, law enforcement, relatives, and respondent regarding the dynamics of the family and incidents surrounding the time KA was injured. At the end, the trial court was convinced that either respondent or father had injured KA and that one parent had to know that the other parent injured the child. The trial court found the children were not safe with respondent based on the potential for future injury and respondent's failure to protect KA. It also found that statutory grounds for termination were proven but, reserved disposition for a later date. At the disposition hearing, the

trial court reiterated its holding that termination was appropriate in this case where KA suffered severe injuries and respondent failed to protect her. The trial court conducted a best interest hearing and held that termination was in both AL's and KA's best interests given their young age and need for stability and permanency.

II. CHALLENGES TO THE COMBINED EVIDENTIARY HEARING AND TRIAL

A. Fair Trial

Respondent first argues that the trial court violated her right to a fair trial by failing to make a ruling on the admissibility of KA's statements pursuant to MCR 3.972(C)(2)(a) before holding the trial. This argument is unpreserved and reviewed for plain error affecting respondent's substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). Respondent and the prosecutor moved for the admission of statements made by KA under the tender years exception to the hearsay rule, MCR 3.972(C)(2). The statements of KA supported that AL's father harmed KA and caused life-threatening injuries. The trial court combined a portion of the evidentiary hearing with the trial in the interest of judicial economy. After the evidentiary hearing and trial were complete, the trial court ruled that KA's statements were inadmissible. Although this was a plain error because MCR 3.972(C)(2) required a decision on the issue before trial, respondent is not entitled to relief because she has failed to establish that her substantial rights were affected as a result of the alleged error. *Rivette v Rose-Molina*, 278 Mich App 327, 328-329; 750 NW2d 603 (2008).

Respondent argues that, had the trial court ruled that the statements were inadmissible before the trial, she would have "likely focused on other evidence that would [have] tend[ed] to corroborate" that she did not know abuse was occurring and that she did not act in an abusive or neglectful manner. Respondent does not assert what "other" evidence she would have presented or used to support her position. Further, contrary to respondent's arguments, the record does not support that she relied on KA's statements to mount a defense at the trial. Rather, respondent testified at the trial that she was not sure if KA's injuries were caused by abuse and that she did not believe that AL's father was responsible for the injuries. She denied that she knew the source of the injuries and surmised that someone else who was present in her home on the evening of April 24, 2012 could have harmed KA. Additionally, although respondent had the opportunity to present additional evidence at the dispositional hearing, which was held one month after the trial court rendered its oral ruling that KA's statements were inadmissible, respondent only offered her own testimony at the hearing; she reiterated that she did not know how KA was injured and that she did not believe that AL's father was responsible. Respondent has failed to establish that her substantial rights were affected. *Rivette*, 278 Mich App at 328-329.

B. Findings of Fact

Respondent also argues that, because the trial court combined the evidentiary hearing with the trial, the trial court's findings of fact were ambiguous. We disagree. The trial court's oral ruling was detailed and clearly outlined the evidence that it relied upon when determining that KA's statements were not admissible and that it was appropriate to exercise jurisdiction over the children.

C. Admissibility of Evidence

Respondent next argues that the trial court improperly ruled that KA's statements regarding the source of her injuries were inadmissible pursuant to MCR 3.972(C)(2). We review "a trial court's decision regarding the admission of evidence" for an abuse of discretion. *In re Utrera*, 281 Mich App at 15. "MCR 3.972(C)(2)(a) requires a child's out-of-court statements concerning acts of child abuse to have adequate indicia of trustworthiness before they will be admitted at trial." *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007). This requires consideration of "the totality of the circumstances surrounding the making of the statement." *Id.* "Circumstances indicating the reliability of a hearsay statement may include spontaneity, consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *Id.* This Court has also considered that the individual who interviewed the child followed forensic interviewing protocol and that the child's statements were corroborated by physical evidence. *Id.* at 82-83.

Here, KA was slightly over 2-1/2 years old when she sustained the severe abdominal injuries. Because of her young age, it was uncertain whether she was developmentally capable of connecting the injury with the individual who perpetrated the physical abuse. During the 53 days that KA was in the hospital, she did not make statements about the source of her injuries. Within days after KA was released from the hospital and placed with her maternal grandmother, she began making statements about "daddy" injuring her "tummy." Expert testimony established that preschool aged children are very suggestible. The maternal grandmother was vocal about her dislike of AL's father and the fact that she believed that he had injured KA. At the time that KA was placed with her maternal grandmother, respondent had been criminally charged in relation to KA's injuries. Lorraine Siegrist, KA's therapist, testified that she had witnessed the maternal grandmother and the children's maternal great-aunt calling AL's father derogatory names in the presence of KA on at least one occasion. Expert testimony established that children's memories can be "tainted" by hearing an adult make a negative comment about a person. The experts also opined that research supports that young children who overhear adults describing an event believe that what they overheard actually occurred even though the children did not experience the event. Text messages between the maternal grandmother and the case worker support that, at the very least, the maternal grandmother encouraged KA to make statements to third parties about "daddy" injuring her and that she wanted KA to develop her statements so that it would be clear that it was AL's father that injured her.

KA's description of how she sustained the injury evolved during the proceeding, and expert testimony established that the statements could have changed over the course of the proceeding because of improper questioning. During the proceeding, the maternal grandmother brought KA to Siegrist and Dr. Sharon Hobbs without the permission of the trial court and without the knowledge of the prosecutor or lead detective. KA told Siegrist and Dr. Hobbs that "daddy" injured her "tummy" by kicking and stomping on it. KA began therapy with Siegrist in July 2012. The record supports that Siegrist asked KA a leading question during a therapy session on at least one occasion. In September 2012, KA submitted to a forensic interview with Dr. Hobbs. The record does not support that Dr. Hobbs used the Michigan forensic interviewing protocol, which is designed to gather information from a child in a way that is truth-seeking, unbiased, and child sensitive. Importantly, Dr. Hobbs failed to record the questions that she asked KA, and it was unknown whether leading questions were asked during the interview. In

October 2012, Elizabeth Smith, a forensic interview specialist, determined that KA was unable to submit to a forensic interview because KA reported incorrect information in an interview and demonstrated that she was highly suggestible. Viewing the totality of the circumstances, we find that the trial court properly determined that KA's statements about the source of her injuries did not have sufficient indicia of trustworthiness. The trial court did not abuse its discretion by declining to admit the statements into evidence pursuant to MCR 3.972(C)(2). See *In re Utrera*, 281 Mich App at 15.

IV. STATUTORY GROUNDS FOR TERMINATION

Respondent next challenges the trial court's determination that termination of her parental rights was proper pursuant to MCL 712A.19b(3)(g) and (j). In order to terminate parental rights, the "trial court must find by clear and convincing evidence that one or more grounds for termination exist. . . ." *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009). We review "the trial court's determination for clear error." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *In re HRC*, 286 Mich App at 459.

We find that the trial court did not clearly err by finding that petitioner established, by clear and convincing evidence, a statutory ground for termination of respondent's parental rights under MCL 712A.19b(3)(g). A trial court may terminate parental rights under MCL 712A.19b(3)(g) when "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." This Court has previously found that termination was proper pursuant to MCL 712A.19b(3)(g) where two children "suffered unexplained, serious, nonaccidental injuries consistent with intentional abuse while in [the] respondents' sole care and custody," and the record evidence established that at least one of the parents caused the injury and the other failed to prevent the children's injuries. *In re VanDalen*, 293 Mich App at 139-141.

Respondent was in a relationship with AL's father at the time KA was born, and the record supports that he was aggressive at times. In the past, respondent reported to Dr. Lisa Markman that KA had "spontaneous" bruising in places that would be difficult to accidentally injure, such as her thighs and head. However, respondent failed to bring KA to a recommended medical examination to determine the cause of the bruising. In 2011, KA sustained a broken collarbone. Although the collarbone injury was consistent with an accidental fall, the record establishes that the injury went untreated for a period of time. In April 2012, respondent, AL's father, and the children were living together in the same home. The record supports that there were periods of time on April 24, 2012 that KA was alone with either respondent or AL's father, but she was always in the care of one of them. Sometime on April 24, KA sustained life-threatening injuries that were likely caused by an adult kicking, punching, or stomping on her abdomen. KA also had bruising on her back and red marks on her buttocks when she was admitted to the hospital, where she remained for 53 days because of the extent of her injuries. Upon being informed that KA was going to the hospital, the mother of AL's father text messaged respondent and stated that she hoped that KA was removed from respondent's care and asked

what she “did to” KA. The response was “[k]ill[ed] her dumb ass.” AL’s father later admitted to sending the text message.

Initially, respondent denied that she knew the source of KA’s injuries. However, on April 26, 2012, respondent reported that she caused KA’s injuries during a period of time when AL’s father was out of the house on the morning or afternoon of April 24. Respondent claimed that the injuries accidentally occurred while she was playing “airplane” with KA. However, Dr. Markman testified that, short of a major motor vehicle accident, the injuries could not have been inflicted accidentally. The lead detective believed that respondent caused KA’s injuries and was minimizing the manner in which they occurred. Respondent was charged with torture and first-degree child abuse, but the charges were ultimately dropped. She was later convicted of witness intimidation in connection to the criminal charges. Throughout the proceeding, respondent’s version of the events surrounding KA’s injuries changed, and they were not consistent with the statements made by AL’s father. At the termination hearing, respondent denied that she knew the source of KA’s injuries and alleged that she did not believe that AL’s father caused them. The record supports that respondent continued to have contact with AL’s father during the proceeding; this led to her violating her probation, being sentenced to jail, and losing her Holmes Youth Trainee Act status. The record clearly supports that respondent either caused KA’s injuries or failed to prevent them from occurring. On this record, the trial court properly determined that respondent was unable to provide proper care and custody to the children at the time of termination. See *In re VanDalen*, 293 Mich App at 139-141.

Further, the record clearly establishes that there was “no reasonable expectation that the parent [would] be able to provide proper care and custody within a reasonable time considering” the ages of the minor children. See MCL 712A.19b(3)(g). At the time of termination, KA was four years old and AL was 23 months old. Respondent failed to provide a plausible explanation as to the cause of KA’s severe injuries during the 15 months following the injuries, and this supported that she would not be able to provide care within a reasonable time. Moreover, respondent continued a relationship with AL’s father and was pregnant with a child that was possibly his. The trial court’s finding that termination of respondent’s parental rights was proper pursuant to MCL 712A.19b(3)(g) does not leave us with a definite and firm conviction that a mistake has been made. *In re HRC*, 286 Mich App at 459. Because we have concluded that at least one ground for termination existed, we need not consider the additional ground upon which the trial court based its decision. *Id.* at 461.

V. BEST INTERESTS

Respondent also makes several arguments regarding the trial court’s finding that termination of her parental rights was in the best interests of the children. “Once a statutory ground for termination has been proven, the trial court must find that termination is in the child’s best interests before it can terminate parental rights.” *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012); MCL 712A.19b(5). We review a trial court’s finding that termination is in the minor child’s best interests for clear error. *In re HRC*, 286 Mich App at 459.

Respondent first contends that the trial court clearly erred in its best-interest determination because it failed to give sufficient weight to the fact that the children were placed with relatives at the time of termination. The trial court referred to the children’s relative

placement during its oral ruling, and it found that termination was nonetheless in the children's best interests given that they were at risk of physical harm in respondent's care. "Because the trial court was required to . . . explicitly address [the children's] placement with relatives at the time of the termination hearing," and the trial court did so, it met its obligations and the factual record was adequate to make a best-interests determination. *In re Olive/Metts*, 297 Mich App at 43-44. We reject respondent's argument on appeal that the trial court failed to place sufficient weight on the fact that the children were placed with relatives at the time of termination.

Next, respondent argues that the trial court breached the duty established in *In re Olive/Metts*, *id.* at 42, "to decide the best interests of each child individually." We disagree. "[T]his Court's decision in *In re Olive-Metts* stands for the proposition that, if the best interests of the individual children *significantly* differ, the trial court should address those differences when making its determination of the children's best interests." *In re White*, 303 Mich App 701; 846 NW2d 61 (2014); slip op at 7. Therefore, a trial court does not clearly err if it "fails to explicitly make individual and—in many cases—redundant factual findings concerning each child's best interests." *Id.* Here, the record does not support that the minor children's best interests significantly differed. Rather, both of the children required a positive relationship with their caregivers and an environment free from the threat of physical abuse. The record clearly supports that respondent could not provide this at the time of termination. As a result, the trial court did not clearly err by failing to make individual factual findings concerning each child's best interests. See *In re White*, slip op at 7.

Finally, respondent argues that termination of her parental rights was not in the minor children's best interests because the record established that they were bonded to her and that she was able to parent them. This Court has previously held that termination was in the best interests of the children where there was a "serious dispute" on the record concerning whether the respondent had "a healthy bond" with her children. *In re CR*, 250 Mich App 185, 196-197; 646 NW2d 506 (2002). Here, when the children were removed from respondent's care, KA was slightly over 2-1/2 years old and AL was seven months old. At the time of termination, the children had been out of respondent's care for 15 months, and they had been in their relative placement for one year. The children did not seem to miss respondent when she was not present, and they did not ask about her after she returned to jail 10 days before the termination hearing. See *id.* Further, while in the care of respondent and AL's father, KA suffered severe physical abuse that resulted in life-threatening injuries. At the time of the termination hearing, respondent denied that she knew the source or the cause of KA's injuries. This was the case even though she and AL's father were KA's primary caregivers in April 2012. Therefore, the "safety and well-being" of KA and AL "could not be reasonably assured in light of the past severe abuse" that KA sustained while in respondent's care. *In re VanDalen*, 293 Mich App at 142.

The record supports that the children were doing well in their relative placement. The relative caregivers had expressed an interest in adopting AL, and she was "fairly bonded to them in an appropriate way." KA was bonded to her legal father, and it was likely that she would be placed with him in the future. The record supports that respondent was unable to provide the children with routine or stability at the time of termination. The fact that the minor children had been placed in a stable home and the fact that the children would be provided with continued stability and permanency supports that termination was in their best interests. See *In re VanDalen*, 293 Mich App at 141-142. Although termination would likely result in AL and KA

being separated, termination of respondent's parental rights was required to ensure the safety of each of the children. See *In re Olive/Metts*, 297 Mich App at 42. Based on a review of the record, the trial court correctly ruled that terminating respondent's parental rights was in the children's best interest. It did not clearly err. *In re HRC*, 286 Mich App at 459.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Cynthia Diane Stephens